

1 did I read that right?

2 A Other than missing the quotation
3 marks, you read it correctly.

4 Q I knew you were waiting for me on
5 that one. Now, "regionals" refers to regional
6 sports networks as far as you know?

7 A Yes.

8 Q You've done no analysis, have you,
9 of how Comcast pays or carries its regional
10 sports network?

11 A I have --

12 Q In this case?

13 A Yes, I wanted that caveat.

14 Q In this case?

15 A In this case, I have not, no. It
16 is not relevant.

17 Q And do you see what Mr. -- Ms.
18 Khoury puts a note in front of this article
19 that she sends along to Mr. Shell, and she
20 says, "I mentioned" -- I am now on the first
21 page in the first paragraph of her note to Mr.
22 Shell, the second sentence, she says, "I

1 mentioned the issue of sports tier and Comcast
2 in Jeff's staff meeting today. We are working
3 on messages that we can share," and then she
4 continues the sentence. Did I read that
5 correct?

6 A Yes, you did.

7 Q And Mr. Shell says, "Tough to
8 argue our side of the case." Did I read that
9 correctly?

10 A Yes, you did.

11 Q Is this a document that you have
12 seen before?

13 A I have seen it.

14 Q Outside of our deposition?

15 A I saw it I think as an exhibit to
16 -- I read Mr. Shell's deposition. I believe
17 it was an exhibit to that.

18 Q Did you look at it before you
19 issued your first opinion in this case?

20 A First opinion is -- this cases
21 dates back now almost a year, so what do you
22 define as a "first opinion"?

1 Q I guess that one.

2 A No, I did not.

3 Q Mr. Orszag, in your direct
4 testimony, and also in your written testimony,
5 you spend a lot of time talking about Dr.
6 Singer. Do you recall that?

7 A Yes, I do.

8 Q And in fact, believe it or not, we
9 made a paralegal sit down and count how many
10 times you talked about Dr. Singer in your
11 direct testimony. Do you have any idea how
12 many times that is?

13 A Not something I have searched on.

14 Q Would it surprise you to hear it
15 is 225 times you mentioned him?

16 A In 80 pages? It's not surprising.

17 Q You have a lot of criticisms of
18 the price valuation he has come up with,
19 right?

20 A I do.

21 Q Even though according to your own
22 chart, the one we had up on the board earlier,

1 it is only three-quarters of the chart you put
2 up, right, the value on the chart you put up,
3 correct?

4 A Correct. I mean --

5 Q Okay. And my question to you is:
6 have you come to the Court with your own
7 price?

8 A I do not believe it is all
9 reliable as a matter of econometrics to use
10 nine observations to develop a price that
11 should be imposed here. I --

12 Q My question was different.

13 A I have not done that.

14 MR. TOSCANO: Your Honor?

15 THE WITNESS: I do not believe it
16 is -- one could come up with a reliable
17 estimate.

18 BY MR. SCHMIDT:

19 Q So you have no price for the Court
20 as to what Comcast should pay to the NFL
21 Network?

22 A No. I'm not going to produce

1 something that is unreliable.

2 JUDGE SIPPEL: Just answer the
3 question. You don't have a price?

4 THE WITNESS: No, I do not.

5 JUDGE SIPPEL: Fine.

6 BY MR. SCHMIDT:

7 Q And you've done no analysis of
8 what the right price is for Versus or the Golf
9 Channel, have you?

10 A Right price for whom?

11 Q Well, I will read to you from your
12 deposition. I asked you, "Have you done any
13 empirical analysis of what you believe the
14 right price is for either Versus or the Golf
15 Channel?" And you said, "No, I have not."

16 A I think that it followed after you
17 had asked me about the NFL Network, and I had
18 said, "For whom?" and I had said that there
19 were some that were -- that it was the right
20 price, because they paid it, and some that it
21 was too high. And then, you followed up with
22 that, and I think I answered that, because I

1 -- because just about every carrier out there
2 is paying the price, but I haven't done an
3 "analysis" of what the right price is.

4 Q Okay. And that's what I'm getting
5 at.

6 A Okay.

7 Q You haven't come up with --

8 JUDGE SIPPEL: All right. Don't
9 repeat. You've got it. Let's go. I'm going
10 to lose it.

11 MR. SCHMIDT: I'll take the
12 friendly suggestion.

13 (Laughter.)

14 BY MR. SCHMIDT:

15 Q Let me show you what may be my
16 last exhibit to you. It has been marked into
17 evidence as Exhibit 113.

18 If I may approach, Your Honor.

19 JUDGE SIPPEL: You may. Now, this
20 is Enterprise 113. This is in?

21 MR. SCHMIDT: Yes, it is, Your
22 Honor.

1 JUDGE SIPPET: Thank you.

2 BY MR. SCHMIDT:

3 Q This is a document that is an e-
4 mail with an attachment from someone named
5 David Cohen to someone named D'Arcy Rudnay.
6 Do you know who David Cohen is?

7 A I met Mr. Cohen, but I don't know
8 what his precise title is.

9 Q When did you meet Mr. Cohen?

10 A I wouldn't know the first time I
11 met him, but it was years ago in the context
12 of maybe a proceeding here at the FCC.

13 Q Have you met him in connection
14 with your work in this case?

15 A No, I have not.

16 Q Did he have any role in your
17 retention in this case, to your knowledge?

18 A Not that I'm aware of.

19 Q Okay. What I would like to ask
20 you to do is look at the date of this
21 document, August 25, 2006. Do you see that?

22 A Yes, I see that.

1 Q And I don't know if you were here
2 in court yesterday when we looked at the
3 newspaper article that suggested it was some
4 time in September when Comcast first went
5 public with the tiering.

6 A Yes, I heard that.

7 Q Okay. So do you understand this
8 e-mail to date from before the time that
9 Comcast announced it would tier the NFL
10 Network?

11 A I understand that, yes.

12 Q What I would like to ask you to do
13 is look in the text of this document. It
14 looks like it is a slightly indented paragraph
15 that begins, "One additional project," do you
16 see that on the first page?

17 A The document or the e-mail? I'm
18 sorry.

19 Q I apologize. The e-mail, I
20 misspoke.

21 A Okay.

22 Q Okay? Do you see in the -- in

1 that --

2 A I see it.

3 Q -- that sentence that begins, "One
4 additional project that I don't think we have
5 enough on. How do we defend ourselves from"
6 -- and then it lists two items, right?

7 A That is correct.

8 Q And the second item is "the
9 program access challenge." Do you see that?

10 A I do see that.

11 Q Do you understand that to be a
12 reference to this lawsuit?

13 A I don't know if it's in regard to
14 this lawsuit or another proceeding or what it
15 regards. I'm sorry. I -- this is the first
16 I've seen this cover note. I have seen the
17 final version of the document that is attached
18 to it.

19 Q And I don't mean to mislead you.
20 This lawsuit had not been filed at the time of
21 this document, because the tiering had not
22 even been announced at the time of this

1 document. So a more precise version of my
2 question would be: do you understand this to
3 be a reference to the possibility of this
4 lawsuit?

5 A I'm just reading the whole -- just
6 -- I don't know if it regards this lawsuit or
7 some other proceeding, but, I mean, sitting
8 here it seems like they were worried about the
9 tiering leading to a program access challenge.

10 Q And that is exactly what happened,
11 right?

12 A Yes, that is.

13 Q And, specifically, they were
14 worried about the allegation, they were
15 worried that we would come to the FCC and say,
16 "You are treating us differently than you are
17 treating OLN," right?

18 JUDGE SIPPEL: Than you are
19 treating who?

20 MR. SCHMIDT: The NFL Network
21 differently than you are treating OLN or
22 Versus.

1 JUDGE SIPPEL: Thank you.

2 MR. SCHMIDT: At this time it was
3 called OLN.

4 THE WITNESS: Right. That's what
5 they were worried somebody would accuse them
6 of doing, but that doesn't mean it's a
7 relevant standard.

8 BY MR. SCHMIDT:

9 Q And the specific thing he states
10 is, number two, "The program access challenge,
11 that we were going to jack up the rates for
12 OLN even more, and now that we don't have the
13 games on OLN, we are punishing an unaffiliated
14 network." And then he starts with the
15 parentheticals, do you see that?

16 A I do see that.

17 Q And he says, "For now, I think we
18 rely on the distinction between OLN, which has
19 lots of other programming, and the NFL
20 Network," correct? Did I read that right?

21 A You did read that correctly.

22 Q That is the distinction you rely

1 on, isn't it?

2 A Rely on -- I discuss the fact that
3 they have differences in programming, yes.

4 Q The same idea that Mr. Cohen is
5 talking about before the tiering was even
6 announced, right?

7 A Yes.

8 Q Mr. Orszag, if I may ask you, how
9 much do you bill for your time in this case?

10 A I don't bill. My firm bills.

11 Q How much does your firm bill for
12 your time in this case?

13 A My firm bills me at a rate of \$700
14 an hour, but I do not keep that.

15 Q You have an ownership interest in
16 your firm, right?

17 A Yes, I do.

18 Q Do you have an associate here with
19 you today, or a colleague?

20 A Yes, I do.

21 Q And he has been with you
22 throughout these proceedings, right?

1 A Not all of the proceedings, but
2 yes.

3 Q How much does he bill out at?

4 A Sitting here today, I have no
5 idea.

6 Q Okay. Is it half as much?

7 A No, it's more than half as much.

8 MR. CARROLL: Your Honor, he
9 didn't -- I object to the relevance of this.
10 They have a hired expert, too, and we treated
11 him the courtesy of not getting into his
12 billing rates and all of that, because -- from
13 the understanding both sides, obviously, have
14 experts that they pay. I really don't know
15 what the point of that is.

16 MR. SCHMIDT: Well, Your Honor --

17 MR. CARROLL: And we showed them
18 that courtesy.

19 JUDGE SIPPEL: I appreciate that.
20 But what -- so -- your response, sir?

21 MR. SCHMIDT: My response is ask
22 Mr. Hawkins that question. Mr. Hawkins is a

1 consultant. He was billing for his lost time.

2 Mr. Orszag is a consultant. He is billing.

3 And I understand one is a fact witness and one

4 is an expert witness, but I think I should be

5 able to ask him.

6 THE WITNESS: Well, I am not

7 billing for my time. It's just a fact that my

8 firm is billing.

9 JUDGE SIPPEL: All right. Let's

10 just drop it. I think we've got something

11 else to talk about?

12 MR. SCHMIDT: We are entitled to

13 put it in the record.

14 JUDGE SIPPEL: It's in.

15 MR. SCHMIDT: Understood.

16 JUDGE SIPPEL: Let's go.

17 MR. SCHMIDT: Understood. We're

18 done, Your Honor.

19 JUDGE SIPPEL: Pardon?

20 MR. SCHMIDT: We're done, Your

21 Honor.

22 JUDGE SIPPEL: You're finished?

1 MR. SCHMIDT: We're finished.

2 JUDGE SIPPEL: I thought maybe I
3 misunderstood you.

4 (Laughter.)

5 MR. SCHMIDT: Happy days are here,
6 Your Honor.

7 JUDGE SIPPEL: All right. Well,
8 Mr. Schonman, please.

9 MR. SCHONMAN: Thank you, Your
10 Honor.

11 BY MR. SCHONMAN:

12 Q Mr. Orszag, my name is Gary
13 Schonman. I am co-counsel for the Enforcement
14 Bureau.

15 JUDGE SIPPEL: Excuse me just a
16 minute. Can we open that door and see if we
17 can get some fresh air in here? I think we
18 have scared everybody out of here.

19 (Laughter.)

20 MR. CARROLL: The one person there
21 is not from the public, so we are okay.

22 JUDGE SIPPEL: Thank you. Thank

1 you. We'll be more comfortable.

2 BY MR. SCHONMAN:

3 Q The good news is I don't have any
4 documents to show you, or charts or figures to
5 go over.

6 A Great.

7 Q But I do have some very
8 fundamental questions for you, and I would
9 like you to walk me through some of these
10 matters. Is the NFL Network, in your opinion,
11 similarly situated with the Golf or Versus
12 Networks?

13 A It is not an analysis that I
14 actually undertake. I just assume that they
15 are, and then conduct my analysis, because to
16 take -- "similarly situated" is not an
17 economic concept. It is a legal concept. The
18 economic concept that I have used is: are
19 they direct competitors? Are they close
20 competitors? And to do that type of analysis
21 in terms of viewership and advertising is
22 extremely difficult.

1 So I actually just adopt Dr.
2 Singer's assumption that the scope of
3 competition is all national cable sports
4 networks. And so I just adopt it, and then do
5 my -- use my framework from there.

6 Q Are they direct or close
7 competitors?

8 A I have not seen -- and let's focus
9 on each market, because each market is
10 different. I have not seen any evidence that
11 they are close competitors for viewerships,
12 but I haven't seen any that contradicts it,
13 except for myself in terms of Golf, so that is
14 not necessarily -- that is just one data
15 point, so I am not going to rely upon it.

16 In terms of advertisers, again, it
17 would be the same answer. I haven't seen
18 anything to suggest that they are extremely
19 close competitors, but I haven't seen that
20 they are not competitors -- any evidence to
21 suggest that they are not competitors at all.

22 And then, we have already

1 discussed content acquisition, and there it is
2 very clear that Golf is in a -- not in the
3 same market as the NFL Network. They have
4 never bid against each other. But Versus and
5 the NFL Network have.

6 Q All right. Let's take
7 advertising. That was the first matter,
8 right?

9 A Yes.

10 Q And in that area, so I understand
11 your opinion, they are competitors for
12 advertising, or they are not?

13 A I would say -- I believe that all
14 channels compete for advertisers. And if you
15 are trying to reach eyeballs, you can get my
16 eyeballs when I am watching 24 on Fox or when
17 I am watching the New England Patriots on --
18 if -- you know, on CBS, if they are carried on
19 CBS. So an advertiser's goal is to reach our
20 goals, and they care about particular
21 demographics, etcetera.

22 And so they have lots of different

1 options. So what I would say is that the
2 market is very broad, and there is lots of
3 options for advertisers. And you can be in
4 the same relevant market, can be competitors
5 of each other, but not particularly close
6 competitors. And I haven't seen any evidence
7 to suggest that they are particularly close
8 competitors.

9 Q So as a general matter, you are
10 saying that all channels are competing with
11 each other, regardless of --

12 A I think there is a lot of evidence
13 that all channels compete, but I restrict
14 myself here and adopt Dr. Singer's approach of
15 saying the scope of competition is national
16 sports networks, because there is no reason to
17 -- this would become a very detailed technical
18 date, if one were to start defining relevant
19 markets, and it was easier for my opinion to
20 start with that assumption, and then discuss
21 the other issues of the case.

22 Q When you talk about "markets," do

1 you mean the sports market or maybe the movie
2 market, is that what you mean?

3 A I'm talking about relevant markets
4 in the context that a -- if we are in an FCC
5 proceeding about a merger, one of the
6 questions that we would present to the
7 economists and the staff reviewing the merger
8 is the relevant market for the merger.

9 So I am thinking about it in an
10 antitrust competition perspective of: do
11 advertisers view the NFL Network and Golf,
12 say, as substitutes for one another to reach
13 particular groups of eyeballs?

14 Q What is your conclusion there?

15 A I haven't done a statistical
16 analysis of that.

17 Q Okay.

18 A My answer I think is that there
19 are some advertisers who probably do, but the
20 vast majority don't.

21 JUDGE SIPPEL: Is this just a
22 product market? What about a geographic

1 market? Is it --

2 THE WITNESS: I think we are all
3 in -- this is national programming. It is
4 available nationwide.

5 JUDGE SIPPEL: So it is a national
6 market.

7 THE WITNESS: It is a national
8 market. And that is one of my -- I discuss in
9 the direct testimony that this is a very
10 competitive space, so there is no plausible
11 claim of harm to competition, given the degree
12 of competition in the marketplace.

13 JUDGE SIPPEL: Well, we have had
14 this testimony about WOWs and buildovers, and
15 those types of things.

16 THE WITNESS: So that is -- we're
17 -- there's two different parts of the market.
18 And we actually had a chart on this, but we,
19 for brevity, decided not to. The market
20 structure that -- at some sense the top is
21 content right owners -- right owners, like the
22 NFL, the PGA Tour, MLB, Major League Baseball.

1 They sell their programming to
2 programming providers, to networks. They sell
3 their programming to distributors like
4 Comcast, DirectTV, Cablevision, and then they
5 sell their bundles of packages to subscribers.

6 And what I'm talking about right
7 now is competition among networks, the second
8 tier down. So that's the Versus --

9 JUDGE SIPPEL: Right, right,
10 right, right.

11 THE WITNESS: -- the NFL Networks.
12 And that is an extremely competitive market in
13 terms of advertisements. The market that you
14 just mentioned in terms of MVPDs has become
15 dramatically more competitive in the last five
16 years with both the continued growth of the
17 DBS firms -- that is DirectTV and EchoStar or
18 Dish Network -- and then the introduction --
19 the entry of AT&T and Verizon. And AT&T and
20 Verizon have gained a lot of share very
21 quickly.

22 So that market, I think it was

1 characterized some time yesterday, has become
2 quite dynamic.

3 BY MR. SCHONMAN:

4 Q That's the advertising arena.

5 A Yes.

6 Q In terms of content, are they
7 competitors, direct or close competitors?

8 A Well, Golf -- let's do one at a
9 time. Golf and the NFL Network, there's no
10 evidence that I have seen that they have ever
11 competed for content at all. And it would
12 make sense. One is a football channel, and
13 one is a golf channel.

14 So from the perspective of content
15 acquisition, Golf and the NFL Network are not
16 similarly situated, are not competitors. I
17 would rather use the word "competitors."

18 Q How about Versus?

19 A Versus -- they have competed, as I
20 discussed, in -- both for the eight-game
21 package and the conference package that we
22 discussed about an hour ago I guess. And that

1 would make them competitors.

2 Q Okay. In addition to advertising
3 and content, are there any other criteria that
4 you look at in determining whether networks
5 are direct or close competitors?

6 A Those are the two -- well, there
7 would be one other market that I would
8 consider. From the perspective of an MVPD, do
9 they view the content that is offered on, say,
10 the NFL Network --

11 Q Does who view?

12 A The MVPD.

13 Q Okay.

14 A So if Comcast -- I will just use
15 Comcast as an example. If Comcast viewed the
16 programming offered by Versus and Golf as a
17 substitute for the NFL Network, they would not
18 have to carry the NFL Network, because
19 subscribers would view it the same way, and it
20 doesn't offer incremental value. It wouldn't
21 help them attract or retain subscribers.

22 The best example I think would be

1 like country music channels or home shopping
2 networks perhaps. If you have two country
3 music channels that offer very similar
4 content, it is not necessary for an MVPD to
5 offer both, because the first one will get
6 them the fans of country music in terms of
7 attracting and retaining subscribers, but
8 adding the second one may provide very small
9 incremental value to them.

10 Q So the issue here, then, is how
11 does the -- how does the cable carrier, the
12 cable company, view the programming?

13 A Well, the very fact --

14 Q Is that correct?

15 A Yes, I think that is.

16 Q And how do you determine how a
17 cable company views the programming?

18 A It's not easy. I mean, it's
19 difficult to quantify a metric. I don't know.
20 I have done this in the context -- you really
21 need sort of natural experiments to do this.
22 So I have done it in the context of both